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No. 1068.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

WILLIAM C. SEIFERTH and WILLIAM H. SEIFERTH, a Minor, by WILLIAM C. SEIFERTH, His Father and Next Friend,
Petitioner,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, a Corporation,
Respondent.

BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

RALPH D. WALKER,
DAVID B. STUTSMAN,
WALKER & WILLIAMS,
818 Illinois Avenue,
East St. Louis, Illinois 62201,
Attorneys for Respondent.

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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Respondent, St. Louis Southwestern Railway Company, by this Brief, opposes the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on October 11, 1966, in the above entitled cause.

QUESTIONS PRESENTED.

1. Should this Court entertain a Petition for Writ of Certiorari which does not conform to the requirements of Supreme Court Rule 23 (g) and (j)?

2. Is the decision of the Court of Appeals that petitioner was a trespasser in conflict with applicable Missouri common law?

3. Is the decision of the Court of Appeals in the Seventh Circuit in conflict with any decision of the Eighth Circuit?

4. Does the reversal by the Court of Appeals of a judgment in favor of petitioner (plaintiff) where there is no evidence to support the judgment violate petitioner's right of trial by jury?

SUPREME COURT RULES INVOLVED.

28 U. S. C., Supreme Court Rule 23:

1. The petition for Writ of Certiorari shall contain in the order here indicated:

> (g) If review of the judgment of a federal court is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance.
>
> (j) . . . and, if review of the judgment or decree of a federal court is sought, there shall similarly be appended a copy of such judgment or decree, which may however be limited to the portions thereof sought to be reviewed.

STATEMENT OF THE CASE.

The petitioner entered the respondent's freight yard uninvited and for the purpose of hitching a free ride on a freight train (Tr. 118, 119, 215; App. 27, 28, 42). He

was there solely for his own benefit and not for the benefit of the respondent. He was not seen by any of the respondent's supervisory employees nor its special agents.

Although he was seen by several non-supervisory employees, he was not told to leave the premises. He was permitted to ride a freight train by these employees, contrary to the respondent's rules (Plfs. Exh. 18; App. 146).

Employees were not authorized to permit members of the public to ride its trains (Tr. 863, 875; App. 123, 125). Both state and federal law prohibit members of the public, including minors, from riding freight trains (Ill. Rev. Stats. 1963, Ch. 114, Sec. 72; U. S. C. A. Title 49, Sec. 1 (7); Vernon's Annotated Missouri Statutes, Sec. 564.350).

The respondent had no passenger service whatsoever. There was no custom or practice of permitting minors or others to ride its freight trains. Even if there had been, there was no evidence that the petitioner was aware of such a custom or relied thereon.

The petitioner alleged negligence on the part of the respondent. Wilful and wanton misconduct was not alleged. His two causes of action were, (a) passenger-carrier relationship between the parties (Counts III and IV) and (b) attractive nuisance or Kahn Rule case (Counts I and II). These were his bases for alleging negligence rather than wilful and wanton misconduct. The petitioner's present "active negligence" theory of recovery was not raised until after the trial was over. Nowhere in the complaint or the trial court's instructions are the words "active negligence" mentioned or defined.

It was the respondent's theory that the petitioner was not a "passenger" on the freight train, that the attractive nuisance or Kahn Rule was not applicable to this factual situation, and that the respondent's only duty to the petitioner was to refrain from wilful or wanton misconduct.

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

I.

This Court should not entertain a petition for Writ of Certiorari which does not conform to the requirements of Supreme Court Rule 23 (g) and (j).

Petitioner, in his statement of the case and elsewhere in his petition, has omitted to show the basis for Federal jurisdiction in the court of first instance as required by Rule 23 (g).

The petitioner has not appended a copy of the judgment entered by the Court of Appeals on October 11, 1966, which petitioner seeks to have reviewed, as required by Rule 23 (j).

II.

The decision of the Court of Appeals, in this case that petitioner was a trespasser, is not in conflict with applicable Missouri common law.

The Court of Appeals determined from a review of the evidence in this case, that (1) there was no evidence to prove the negligence alleged by petitioner; (2) the petitioner was a trespasser upon respondent's freight train to whom the only duty owed was not to willfully or wantonly injure him; and (3) the evidence that unauthorized railroad personnel had permitted petitioner to ride the freight train contrary to the rules of the railroad, did not under applicable Missouri law remove petitioner from his status as a trespasser.

The law of Missouri fully supports the determinations made by the Court of Appeals. It has been uniformly held by the Missouri courts that persons riding freight trains contrary to the rules of the railroad which prohibit

such riding are trespassers and their status as trespassers is not changed by reason of the fact that such persons are riding with the permission of railroad personnel who do not have the authority to grant such permission. Stringer v. Missouri Pacific Ry., 96 Mo. 299, 9 S. W. 905 (1888); Chrisco v. St. Louis & S. F. R. R., 163 Mo. App. 540, 146 S. W. 1180 (1912); Giles v. Missouri Pac. Ry., 169 Mo. App. 24, 154 S. W. 852 (1913). Although these cases are old, they have withstood the ravages of time and are still the law of Missouri.

The cases relied upon by petitioner upon which he seeks to circumvent this well established rule of law do not involve freight trains which are not designed to carry passengers, and particularly a railroad like respondent who offers no passenger service to the public. The "apparent authority" argument is based upon cases which involve passenger trains or streetcars which the conductor is cloaked with the right to accept or reject passengers. A freight train crew or a switching crew in a railroad yard has no such authority, real or apparent, to accept a passenger for transportation on a railroad which offers no passenger service to the public.

The decisions of the intermediate Federal Appellate Courts on matters of state law are in general considered by the Supreme Court to be conclusive upon it. Huddleston v. Dwyer, 322 U. S. 322, 64 S. Ct. 1015, 88 L. ed. 1246 (1944).

III.

The decision of the Court of Appeals in this case is not in conflict with any decision of the Court of Appeals for the Eighth Circuit.

Dysort v. Mo. K. & T. Railway Company, 122 F. 228, was decided in 1903 long before Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188

(1938), when federal courts were not bound by state court decisions in diversity cases.

In addition, Dysort is clearly distinguishable on its facts. Plaintiff, a physician on an emergency call to a nearby town, presented himself to the agent as a prospective passenger, and because the next train to his destination was a freight train, requested the station agent to obtain authority from the proper supervisor to ride the freight train. The station agent made the request of his immediate supervisor, the trainmaster, who in turn should made the request for such permission to the general superintendent who had authority to grant such permission. The trainmaster, without obtaining authority from the superintendent, informed the agent that permission had been granted and the agent in turn so advised the plaintiff and the conductor on the train. During the trip, the plaintiff was injured and the court rightly held that the plaintiff's status was that of a passenger.

IV.

The Court of Appeals by its action did not invade the province of the jury.

The Court of Appeals did not weigh the evidence as petitioner asserts. On the contrary, the record in this case is devoid of evidence, or inferences therefrom, that any of the railroad personnel who permitted petitioner to ride the train had any authority to grant such permission. The evidence recited by petitioner and relied upon by him on page 10 of petition filed herein, does not in anywise tend to establish authority to allow petitioner to ride. Absent such evidence, petitioner wholly failed to prove an essential fact to remove himself from the status of a trespasser under the applicable Missouri law.

The reversal of a case by the Court of Appeals when there is no evidence of an essential element of the peti-

tioner's case does not invade the province of the jury and does not deprive petitioner of his constitutional right to a trial by jury. Baltimore & Carolina Line v. Redman, 295 U. S. 654; 55 S. Ct. 89; 79 L. ed. 1636 (1935). Galloway v. United States, 319 U. S. 372; 63 S. Ct. 1077; 87 L. ed. 1458 (1943).

None of the reasons assigned by petitioner for review by this Court are applicable. There are no special or important reasons for a review by this Court as the decision affects only the parties involved and there is nothing of importance to the public in this case. There has already been a full and complete appellate review which should be accepted as final. Rice v. Sioux City Cemetery, 349 U. S. 70; 75 S. Ct. 641; 99 L. ed. 897 (1955).

CONCLUSION.

It is respectfully submitted that for the foregoing reasons, this Court should not exercise its discretion and rehear the arguments and contentions which have already been presented to and determined by the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

RALPH D. WALKER,

DAVID B. STUTSMAN,

WALKER & WILLIAMS,
818 Illinois Avenue,
East St. Louis, Illinois 62201,
Attorneys for Respondent.